



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Tishman Construction Corporation

File: B-292097

Date: May 29, 2003

Paul A. Varela, Esq., and Frank S. Murray, Esq., Watt, Tieder, Hoffar & Fitzgerald, for the protester.

Jonathan A. Baker, Esq., Jeffrey Paul Robbins, Esq., and Michael Colvin, Department of Health and Human Services, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement that required offerors to submit both paper and electronic versions of proposals, rejection of the protester's proposal as late because the paper version of the proposal was not delivered by the time set for receipt of proposals was not reasonable, where a complete copy of protester's proposal was timely received in accordance with the solicitation instructions; the late delivery of the paper version was a minor informality that should have been waived.

DECISION

Tishman Construction Corporation protests the rejection of its proposal as late under request for proposals (RFP) No. NIH-NIAID-DMID-03-54, issued by the National Institute of Allergy and Infectious Diseases, National Institutes of Health, Department of Health and Human Services (HHS), for construction quality management services.

We sustain the protest.

The RFP, issued January 24, 2003, provided for the award of a cost-reimbursement contract to provide construction quality management services. The contractor will act as a liaison between the agency and firms that are constructing regional and national biocontainment laboratories for the agency; will provide planning, design, construction, commissioning, activation, occupancy, and closeout activities of each construction project; and will assist in the oversight of grants and contracts for the construction work. RFP at 4.

Offerors were required to submit both a paper and an electronic version of their proposals; the RFP provided detailed instructions for packaging, delivery, and electronic submission of the proposals. Specifically, the RFP stated:

PAPER SUBMISSION: The paper copy is the official copy for recording timely receipt of proposals. You are required to submit one original paper copy of your proposal along with [ten] extra copies required below.

ELECTRONIC SUBMISSION: In addition to the paper submission, you are required to submit your proposal electronically through the CRON (Contracts Review Online) in accordance with the instructions provided below. If you experience difficulty or are unable to transmit, you should submit your proposal on a CD-Rom or ZipDisk by an express delivery service. We can then upload your proposal into the electronic system. You must certify that both the original paper and electronic versions of the proposal are identical.

RFP at 20. The closing time for submission of proposals was stated to be February 24, 2003 at 4:00 p.m., Eastern Standard Time (EST). The RFP contained the standard “Instructions to Offerors-Competitive Acquisition” clause of Federal Acquisition Regulation (FAR) § 52.215-1, which, in pertinent part, provided that a proposal that is received after the specified time for receipt of offerors is “late” and will not be considered, absent certain specified circumstances.

Tishman submitted the electronic version of its proposal, in accordance with the solicitation instructions, to the agency through the CRON website at 3:10 p.m. EST, February 24, before the time set for receipt of proposals. Contracting Officer’s Statement at 2. Tishman’s electronic proposal was, as required by the RFP, formatted using the “portable document format (.pdf)” of Adobe Systems, Inc.; was identical to the written proposal; and included the signature of Tishman’s senior vice president. Protest at 4. Tishman’s paper proposal was not delivered to the agency until 5:13 p.m. EST on that date, which was 73 minutes after the time set for receipt of proposals. Protest at 4; Contracting Officer’s Statement at 2.

The agency rejected Tishman’s proposal as late, and this protest followed. No award has been made under the RFP.

Tishman admits that the paper version of its proposal was late, but complains that its proposal should not have been rejected as late because an identical copy of its proposal was received by the agency electronically, as authorized by the RFP, before the time set for receipt of offers. Citing our decision in Abt Assocs., Inc., B-226063, May 14, 1987, 87-1 CPD ¶ 513, Tishman contends that the failure to timely provide

the paper copy of its proposal was a minor informality, which should be waived, given that the agency had timely received a complete copy of Tishman's proposal.

FAR § 15.208 governs the treatment of late proposals and provides generally that a proposal received after the time set for receipt shall not be considered. The late proposal rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 3.

In Abt, we found that the protester's proposal should not have been rejected as late where the solicitation required the filing of the proposal at two locations but the protester timely filed its proposal at only one location. We reached this conclusion because the agency had timely received a complete copy of the protester's proposal at one location, so that the protester's failure to submit a copy of its proposal to the other location was a minor informality, which should have been waived by the agency, inasmuch as Abt had not obtained an unfair competitive advantage by its failure to timely deliver its proposal at the second location. Abt Assocs., Inc., supra, at 3.

HHS contends that our decision in Abt was essentially "superseded" by our decision in Inland Serv. Corp., Inc., supra. Specifically, HHS states that our decision in Abt relied upon our finding that "neither consideration nor acceptance of the [protester's] offer would contravene the major policy underlying the late proposals clause--the prevention of one offeror's obtaining an unfair competitive advantage," Abt Assocs., Inc., supra, at 3, but in Inland our Office "refined [our] explication of the policy behind the late proposal rule since Abt" to include the avoidance of confusion and unequal treatment of offerors as policy reasons underlying the late proposal rule. Agency Report at 2. HHS argues that rejection of Tishman's proposal is appropriate to avoid unequal treatment and confusion.

We do not agree with HHS that our decision in Abt was "superseded" by our decision in Inland. In Inland, we specifically found that the facts presented in that case were "clearly distinguishable" from those in Abt, because, unlike the protester in Abt, the protester in Inland failed to provide a complete copy of its proposal to any location by the time set for receipt of proposals, so it was properly rejected as late. Inland Serv. Corp., Inc., supra, at 4.

Moreover, HHS is incorrect in its belief that our view of the policy underlying the late proposal rule had changed since the date of our decision in Abt. We have always viewed the underlying policy for application of the late proposal rules as ensuring fair and equal competition and avoiding confusion. See, e.g., Phelps-Stokes Fund, B-194347, May 21, 1979, 79-1 CPD ¶ 366 at 5 (prior to Abt); see also PMTech, Inc., B-291082, Oct. 11, 2002, 2002 CPD ¶ 172 at 3. Given that HHS had received, by means specifically authorized by the RFP, a complete copy of Tishman's proposal prior to

the time set for receipt of proposals, we fail to see how the late proposal rule or policy would be violated by consideration of Tishman's proposal.

HHS argues that consideration of Tishman's proposal would reflect an unequal treatment of those offerors that were able to timely submit both an electronic and paper version of its proposals. HHS neglects, however, to consider that such "unequal treatment," as asserted by the agency here, is not material nor does it present any possibility that Tishman could obtain competitive advantage over other offerors, given that it undeniably submitted a proposal by the closing time. Rather, as we found in Abt, the protester's failure to timely deliver more than one complete copy of its proposal is nothing more than a minor informality. Moreover, contrary to HHS's suggestion, since no one denies that Tishman's electronic proposal was timely submitted and was identical to its paper proposal, there is nothing that indicates any possible confusion.

HHS argues that even assuming this constitutes a minor informality, the regulatory language in FAR §§ 15.306(a)(2) and 52.215-1(f)(3) is permissive and therefore the "contracting officer retained the discretion not to exercise her waiver authority under FAR § 52.215 1(f)(3)." Agency Report at 3. However, as with any other exercise of discretion, the contracting officer's decision must have a reasonable basis. NMS Mgmt., Inc., B-286335, Nov. 24, 2000, 2000 CPD ¶ 197 at 3 (agency's exercise of discretion under FAR § 15.306(a)(2) is reviewable to determine whether it has a reasonable basis); see B-148280, June 1, 1962 (use of the word "may" in the regulation does not confer unlimited discretion on the agency to waive or not waive deviations in bids from the solicitation requirements). Here, not only has the agency not identified any reasonable basis for its refusal to waive Tishman's late delivery of its paper version of its proposal, but we fail to ascertain any possible reasonable basis for it to decline to waive this minor, immaterial deviation from the solicitation requirements. Accordingly, we find that HHS was required to waive Tishman's late delivery of the paper version of its proposal as a minor informality, and we sustain Tishman's protest on this basis. See Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234.

The protest is sustained.¹

We recommend that the agency waive Tishman's late delivery of its paper proposal and include that proposal in the competition. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim for such costs, detailing the

¹ Our Office informed HHS at an outcome prediction alternative dispute resolution (ADR) conference that Tishman's protest was likely to be sustained for the reasons explained above. HHS declined to take corrective action in response to the ADR conference.

time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel